WILLIAM H. SORRELL
ATTORNEY GENERAL

J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

TEL.: (802) 828-3171
FAX: (802) 828-2154
TDD: (802) 828-3171
CIVIL RIGHTS: (802) 828-3657

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05609-1001

October 29, 1997

97-182

Via Federal Express

William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Enclosed please find for filing and distribution to each of the Commissioners the original and nine copies of the Comments of the State of Vermont Office of the Attorney General to the FCC's Notice of Proposed Rule Making In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182.

Thank you.

Sincerely yours,

J. Wallace Malley, Jr.
Deputy Attorney General

Enclosures

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

OCT 30 1997

In the Matter of	)	
	)	
Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

NOTICE OF PROPOSED RULE MAKING

Comments of the State of Vermont Office of the Attorney General

In response to the above referenced Notice of Proposed Rule Making ("NPR"), the Vermont Office of the Attorney General on behalf of the State of Vermont and all of its agencies and boards[1] hereby files the comments set forth below in opposition to Petitioners' proposed preemption Rule with respect to state and local zoning and land use restrictions on the siting, placement, and construction of broadcast station transmission facilities.

I. Introduction

As written, Petitioners' proposed Rule would potentially preempt all state and local land use laws including Vermont's premier environmental land use law known as "Act 250,"[2] and any other "similar law[s], rule[s] or regulation[s]."[3] In addition to the proposed Rule's potential impact on state and local land use laws and other environmental regulations, the State of Vermont is also concerned with (1) the constitutionality of the authority delegated to the FCC under the Telecommunications Act of 1996, (2) the undefined and seemingly unbounded authority delegated to the FCC, and (3) the scope of the FCC's authority in preemption matters such as the one before the Commission. The proposed Rule's impact on state and local land use laws and the legality of the Rule is commented on below.

---

[1]The Vermont Environmental Board has filed separate and supplemental comments.

[2]See 10 Vt.Stat.Ann. Chapter 151. For a thorough analysis of Vermont's Act 250 see The Comments of the State of Vermont Environmental Board and the attachments therein, filed with the FCC on October 8, 1997 in response to the Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 97-192.

[3]See Petitioners' proposed preemption Rule at (b)(2).

II. Impact on State and Local Land Use Laws and Other Environmental Regulations

A. Act 250

The State of Vermont Agency of Natural Resources ("ANR") is best able to protect several of Vermont's natural resources that it is charged with managing and protecting through the oversight provided by the independent Act 250 land use permit process administered by the Environmental Board and district commissions. ANR frequently finds itself providing testimony to the Act 250 commission on development proposals. Significantly, ANR is unable to protect important wildlife habitat, unique natural areas and scenic vistas except through the Act 250 process.

- Wildlife Habitat

Vermonters value wildlife. Recent surveys by the U.S. Fish & Wildlife Service indicate that 82% of Vermonters pursue some form of wildlife-related recreation such as hunting, fishing, birdwatching, photography. The only state with a higher participation rate is Alaska.

While ANR administers fish and game regulations that protect specific wildlife species from overhunting, ANR has no permitting program to protect the habitat upon which the wildlife depends. Without habitat protection, fish and game laws are useless. As a matter of law, the State of Vermont owns the wildlife within its boundaries in trust and has a public responsibility to protect wildlife species. The federal government long has recognized this primary role of the state in regulating and protecting its wildlife. The FCC should not upset this traditional state role by preempting the one tool that Vermont has for protecting wildlife habitat from inappropriately sited broadcast facilities.

Because Act 250 is the only state law designed to protect habitat, it is critical that the state not lose this tool. Significantly, through the utilization of Act 250, the state has accommodated development while protecting many thousands of acres of habitat for bear and deer.

Many of the sites where broadcast facilities would be located are remote, high elevation, forested areas - the habitat of the state's bear and deer populations. Today, bear habitat is largely limited by roads and fragmentation to the spine of the Green Mountains and its foothills. The introduction of broadcast towers, access roads and other facilities into these areas without careful siting controls will further exacerbate the problem of habitat destruction. Bear feeding areas such as wetlands and beech stands, bear travel corridors, and deer wintering areas are all habitats critical to these species' survival in Vermont. In order for these habitats to support viable populations they must be sufficiently separated from human

activity and intrusion. Without reasonable controls, the roads and other infrastructure required by towers will introduce new human access into high elevation areas the state is working hard to protect. Any further weakening of the state's ability to protect wildlife habitat could cause significant harm to wildlife populations.

- Rare and Irreplaceable Natural Areas

The harsh weather, steep slopes, poor soils and short growing seasons of Vermont's high elevation areas provide unique sub-alpine ecosystems for several plants and animals that are sensitive, threatened and/or endangered in Vermont. While the state's Endangered Species law protects individual identified species, Act 250 considers and protects sub-alpine natural areas upon which the species are dependent. Inappropriate siting of broadcast facilities and road infrastructure have the potential to harm natural areas through direct habitat destruction and by allowing for increased human intrusion. Act 250 provides a reasonable tool to insure proper siting of these facilities so as to minimize impacts on these fragile ecosystems.

- Scenic Resources

Act 250 has protected the beauty of the state's landscape for over 25 years. Under Act 250, a proposed development must not have an "undue adverse effect on the scenic quality" of the area in which it is located.

Protection of the state's scenery long has been of concern to Vermonters. In addition to Act 250's history of protecting Vermont's scenic quality, the state was the first in the nation to ban billboards in 1968. And in 1988, Vermont passed the Growth Management Act that requires state agencies, towns, and regional planning commissions to manage development to protect natural, scenic, and historic landscapes.

The scenic quality of Vermont is defined by rolling hills and mountains that provide a backdrop to a pastoral landscape of farms and historic villages. This scene has become a New England icon for the nation. It draws thousands of tourists to the state and thus drives tourism, the state's second largest industry. In addition, this landscape provides a consumer image of Vermont as a special place that adds value to the state's specialty products such as cheese and ice cream. The beauty of Vermont yields real economic benefits for the state. For example, outdoor recreation is an important part of most Vermonters' lives and is a major component of the tourism industry. The character of the landscape in which recreation takes place is an integral component of the recreational experience in Vermont.

In virtually every Vermont community, ridgelines framed against the sky or isolated peaks define the scenic character of those places. These ridges, hills, and mountaintops are often

not distant vistas as characterize most of the west, but part of an intimate landscape and within close visual proximity to roads, neighborhoods, and historic communities.

To protect Vermont's scenery, Act 250 asks that projects "fit" within their scenic context. Broadcast towers - pronounced vertical structures that stand out above the treeline and break the skyline - pose an obvious challenge to proper fit within the Vermont landscape. However, through the Act 250 process, Vermont is able to ensure careful planning of facility locations and to minimize the visual impact of towers.

As is discussed further in Part II-C, below, Act 250 has not acted as an "obstacle" or "hurdle" to the siting of broadcast towers and other communications facilities. Rather it provides a mechanism under which environmental impacts can be identified and minimized.[4]

B. "Similar law[s]"

Petitioners' proposed Rule would preempt state land use laws "or similar law[s]" unless the state can demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective. While Vermont's primary concern is the proposed Rule's effect on Act 250 - a land use law - Vermont is also concerned that the Rule could be interpreted as preempting the many state environmental regulations that ANR administers, assuming environmental laws are considered "similar" laws.

At a minimum, the FCC should clarify that "similar laws" do not include state environmental protection laws. Otherwise, the 37 environmental permitting programs that ANR administers would be potentially preempted for transmission facilities. ANR's permitting programs cover all media and also involve the management of water quality, air quality, and solid and hazardous waste. The State of Vermont urges the FCC to clarify that it does not intend to preempt these basic environmental programs administered at the state level.

The proposed Rule also requires the state to show that a state law at issue is reasonable in relation to health and safety objectives in order to avoid preemption. The State of Vermont is concerned about how the FCC intends to define health and safety objectives. If "health and safety" is defined in the narrow sense of human health and safety, it appears that most of the

---

[4]Significantly, Act 250 allows for extensive public participation in identifying and minimizing environmental impacts. The Act 250 process is easily accessible to the average Vermonter. Petitioners' proposed Rule would turn over this efficient and successful exercise of local control to "faceless" Washington bureaucrats.

State's environmental regulations would be preempted. For example, Vermont's wetland regulations and state water quality standards are primarily concerned not with traditional human health, but with natural resource protection and aquatic health.

Additionally, health and safety concerns fall under the police powers traditionally vested with the States. The State of Vermont is concerned that the proposed Rule, as written, would permit the FCC to broadly preempt the States' health and safety programs. At a minimum, the State of Vermont urges the Commission to clarify that it does not intend to preempt these traditional state powers.

III. Constitutional and Other Legal Issues

A. Limitations on Congressional Delegation of Authority

The "powers of the legislature are defined and limited."[5] The legislature's enumerated powers are set out in the Constitution.

Congress may grant authority to the FCC to specify rules in areas where Congress itself has declared only general principles; however, Congress cannot delegate to the agency power which itself does not possess.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

State sovereignty is a limit on congressional power.

The power to establish and enforce state and local zoning and land use regulations with respect to the siting, placement and construction of broadcast station transmission facilities is a power reserved to the States so long as the regulations are designed to further substantial government interests and are exercised within constitutional limits.

Congress relied on its authority under the Commerce Clause when it enacted the Telecommunications Act of 1996.

Local zoning and land use regulations - including state and local zoning restrictions based on environmental or health effects of radio frequency emissions, tower lighting, painting and marking, and health, safety and traditional land use powers - are matters essential to the separate and independent existence of the states and thus necessarily beyond the reach of congressional power under the Commerce Clause.

---

[5] Marbury v. Madison, 1 Cranch 137, 176 (1803).

If Congress lacks the authority to promulgate the proposed Rule, the FCC lacks the authority to promulgate the proposed Rule.

B. The FCC's Valid Exercise of Congressionally Delegated Power Depends Upon the Prior Adoption of a Declared Policy by Congress and Congressional Delineation of the Circumstances Under Which the FCC's Power is Authorized

"The FCC has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."[6]

Power delegated to an agency must include at least roughly intelligible "standards."[7]

Broad delegations of power permit responsibility for government action to pass out of the hands of Congress and into the hands of the agency.[8]

The FCC contends that the authority for the actions proposed in the NPR is set forth at §§ 4(i), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 336.

The authority delegated to the FCC in each of these sections is broad and lacks intelligible standards and limits.

The State of Vermont objects to this broad standardless delegation and submits that it is improper.

The Supreme Court has rejected broad delegations of congressional power when the action of the government agency claiming delegated power touches constitutionally sensitive areas of substantive liberty.[9] The State of Vermont submits that its

---

[6] Louisiana Public Service Com. v. FCC, 476 U.S. 355, 374 (1986).

[7] See, e.g., Opp Cotton Mills, Inc. v Administrator, 312 U.S. 126, 144 (1941).

[8] See, e.g., United States v. Robel, 389 U.S. 258, 276 (1967) (J. Brennan, concurring opinion) ("[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.").

[9] See, e.g., Greene v. McElroy, 360 U.S. 474, 507 (1959).

land use powers are at least as important as areas of substantive liberty.

The lack of standards is evidence of an improper delegation to the FCC.

Every act undertaken by the FCC must be meaningfully traceable to a specific exercise of constitutionally granted legislative power.

Petitioner's proposed Rule cannot be meaningfully traced to a specific exercise of constitutionally granted legislative power granted the FCC.

The FCC admits as much at paragraph 11 of the NPR when it recognizes "the important state and local roles in zoning and land use matters and [the state's] longstanding interest in the protection and welfare of [its] citizenry." Likewise, "[w]ith regard to complaints concerning visual pollution caused by a licensee's broadcast tower, however, local authorities generally have the **legal jurisdiction**, and because of their location, experience and awareness of local values, are best situated to resolve local land use and related aesthetic questions. Thus the Commission generally accords deference to local authorities' rulings and views in these matters ... ".[10]

C. The FCC Lacks the Authority to Draft the Preemption Rule Proposed by the Petitioners

Assuming that there has been a proper delegation of authority from the Congress to the FCC, the proposed Rule seeks regulation beyond the scope of the FCC's delegated authority.

The fact that Congress created a regulatory agency in order to carry out its statutory program does not by itself determine the FCC's authority to preempt.

The FCC's authority to preempt validly enacted legislation of a sovereign State is contingent on the nature and scope of the authority granted by Congress to the agency.[11]

The FCC cannot confer power upon itself.[12]

Petitioners' proposed Rule is not a valid exercise of the authority granted the FCC contained in §§ 4(i), 303(r), and 336

---

[10]See also Amendment of Part 73 of the Commission's Rules to More Effectively Resolve Broadcast Blanketing Interference, 11 FCC Rec 4750, 4754 (1996) (emphasis added) (citations omitted).

[11]See Louisiana Public Service, 476 U.S. at 374.

[12]See id. at 385.

of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)[13], 303(r)[14], 307[15], and 336.[16] The criteria in these sections does not set up a standard so indefinite as to confer unlimited power.[17]

"Preemption occurs when (i) Congress, in enacting a federal statute, expresses a clear intent to preempt state law, (ii) an outright conflict exists between federal and state law, (iii) compliance with both federal and state law is in effect physically impossible, (iv) there is an implicit barrier within federal law to state regulation in this area, (v) federal legislation is so comprehensive as to occupy an entire field of regulation, (vi) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, or (vii) federal regulations promulgated within the scope of congressionally-delegated agency authority have any of the above effects."[18] Both the FCC in its Notice of Proposed Rule Making and the Petitioners rely on (vi) and (vii) as the basis for the FCC's authority to draft a Rule preempting state and local zoning and land use restrictions.[19]

An "obstacle to the accomplishment and execution of the full objectives of Congress" occurs if "the purpose of the act cannot otherwise be accomplished - if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect - the state law must yield to the regulation of Congress within the sphere of its delegated power."[20]

---

[13]"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

[14]"Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter ..."

[15]Granting of licenses.

[16]"[P]rescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity."

[17]See, e.g., National Broadcasting Company, Inc. v. U.S., 319 U.S. 190, 216 (1943), quoting Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285.

[18]Louisiana Public Service, 476 U.S. at 368.

[19]See NPR at paragraphs 5 and 12.

[20]See Hines v. Davidowitz, 312 U.S. 52, 67 (1941), citing Savage v. Jones, 225 U.S. 501, 533.

Vermont state law does not stand as an obstacle to the accomplishment and execution of the full objectives of the Telecommunications Act of 1986. More specifically, state and local regulation does not stand as an obstacle to the implementation of the DTV conversion and to the institution and improvement of broadcast service generally. To the contrary, there is no reasonable basis to preempt Vermont's Act 250 and other environmental regulations.

- These state tools have not been a hurdle to the placement and construction of broadcast facilities. Rather than placing Vermont's hillsides off limits, the state environmental regulations insure proper siting of facilities by: (1) minimizing impacts to headwater streams, (2) insuring proper erosion control, and (3) avoiding injury or damage to critical habitat, endangered and threatened species, and wetlands.

- Additionally, there are many good economic reasons why the FCC should not undermine Vermont's Act 250 and other environmental regulations. Environmental regulations are key to Vermont's economic health. Vermonters realize that our environmental quality and economic vitality are linked. Many businesses choose to locate in Vermont because of our attractive and unspoiled environment.

- Similarly, Vermont's landscape is an essential element of our tourism industry. Travel is the second largest industry in Vermont, providing diversity and stability to our economy. The travel industry provides more than 1.7 billion dollars to the state's economy and employs more than 46,000 individuals. Maintaining the unique scenic beauty of the Green Mountain state enriches the quality of life for all Vermonters and also attracts substantial tourism. Enjoyment of Vermont is dependent on our scenic resources.

- Vermont balances economic development and environmental protection in a responsible fashion. The FCC should not eliminate Vermont's ability to use its land use and environmental laws in a responsible fashion to guide broadcast facilities to sustainable locations in the state.

Preemption of state and local zoning restrictions based on environmental or health effects of RF emissions, tower lighting, painting and marking, and health, safety and traditional land use powers is not necessary to achieve the FCC's purposes.

- To complement Act 250, the state is embarking on planning efforts at the local, regional, and state level to facilitate the location of broadcast

facilities in areas that will minimize their effects on Vermont's special scenic character and allow for their responsible development in Vermont. The FCC must not prevent the state's ability to protect its tourism industry and pastoral scenery from unplanned, improper siting of broadcast facilities.

- Vermont objects to Petitioners' inference that **nationwide** all state and local zoning regulations constitute an "obstacle" to tower siting and construction either through "environmental assessments, 'fall radius,' collocation and marking/lighting requirements," or "delays resulting from the administration of such restrictions." See NPR at para. 4. A state-by-state review of the alleged "obstacles" is required before the FCC can reasonably promulgate a Rule preempting state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities. As evidenced by these comments, such a review would establish that Vermont's zoning and land use regulations do not constitute an obstacle but instead allow for the reasonable implementation of the FCC's purposes.

Petitioners' proposed Rule does not reasonably accommodate state and local policies within the context of the FCC's authority.[21]

- The proposed Rule appears to give the state five days to deny a request for a facility under Vermont's environmental regulations. This is unreasonable. State agencies deserve a reasonable period to review and investigate a facility application and ask for additional information to understand the merits of a proposal. State agencies also are required by statute and regulation to provide for reasonable public comment on development proposals. The FCC should not foreclose public participation in siting decisions.

- The five day requirement also is likely to have an effect not contemplated by the FCC. Most development applications receive a permit from ANR with conditions to minimize environmental impacts (e.g., move the facility 50 feet to avoid a wetland). However, with a five day review timeframe, state agencies will be forced to deny an application outright as there will be

---

[21]See United States v. Shimer, 367 U.S. 374, 383 (1961); See e.g., U.S. v. Clemmer, 748 F.Supp 1241, 1248 (S.D. Ohio 1989) (local ordinance not facially invalid "since it provides a sufficient structure for balancing state and federal interests required by [FCC Order]").

no time to work with the applicant to better understand and modify the proposal so that it can meet state environmental requirements. The effect of the five day limitation will be the outright denial of facility applications rather than collaboration and accommodation of the proposal.

Petitioners' proposed Rule is not one that Congress has or would have sanctioned.[22]

- Based on its present wording, i.e., the reference to "similar law[s]," the proposed Rule could potentially exempt transmission facilities from such relevant regulations as Vermont's Wetland Rules and state water quality standards. This is unnecessary, overbroad, and in direct conflict with federal mandates regarding wetlands and water quality standards. Facilities are regularly sited in Vermont in compliance with state environmental regulations and without destroying wetlands and water quality.

- The Wetland Rules and water quality standards are probably the two regulations most implicated by siting of broadcast facilities on hillsides. Preemption of the Wetland Rules would be particularly egregious in light of the historic loss of wetlands in Vermont and the federal Clean Water Act's no net loss of wetlands policy. It is estimated that 40 to 50 percent of Vermont's original wetlands resource base has been lost.

- Moreover, Vermont's wetland regulations are reasonable; as a rule of thumb, any broadcast facilities that impact a major wetland are merely required to site 50 feet from a mapped wetland. If this is not possible because of site restrictions, the Wetland Rules also provide for a variance procedure based on minimization of impacts and mitigation. The Wetland Rules are not onerous.

- State water quality standards also apply to tower facilities and require that a project not result in a discharge of pollutants to waters of the state (e.g. soil, fill, wastes, etc.). State discharge permits and compliance with state water quality standards are required under the federal Clean Water Act. At a minimum the FCC should clarify that it cannot preempt the application of state water quality standards to broadcast facilities as these standards are a function of another federal law - the Clean Water Act.

---

[22] See id. at 383.

Congress specifically addressed the overlap among state, local, and federal regulatory authority with respect to tower siting in the context of personal wireless services facilities in the Telecommunications Act of 1996.[23] Congress failed to address the overlap among state, local, and federal regulatory authority with respect to tower siting in the context of digital television service.

The courts have declined to infer preemption in the face of congressional ambiguity.[24]

Petitioners' proposed Rule is unreasonable, unauthorized, and inconsistent with the Telecommunications Act of 1996.

IV. Conclusion

The Vermont Attorney General's Office on behalf of the State of Vermont and all of its agencies and boards requests that the FCC deny Petitioners' proposal and decline to preempt state and local zoning and land use restrictions with respect to the siting, placement and construction of broadcast station transmission facilities.

State of Vermont
Office of the Attorney General

By: J. Wallace Malley, Jr.
Deputy Attorney General

By: Mary K. McCabe
Mary K. McCabe

October 29, 1997

[23]See 47 U.S.C.A. § 332.

[24]See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Congress did not intend to displace state law.").